DELIVERY AS A REQUISITE IN THE SALE OF CHATTEL PROPERTY

THE early law governing the effect of possession or lack of possession on the ownership of chattels has been examined with great care, and the content of the rather meager authorities assiduously explored.[1] Little more is likely to be added to our knowledge of the effect on the ownership of chattel property caused by a voluntary delivery of the goods to a bailee, or by the tortious taking by a trespasser. To what extent Mr. Ames's contention that ownership by the loss of possession was turned into a mere right of action was ever maintainable, is the less important because it certainly ceased to be so centuries ago, and such a theory has left no impress on modern law. The results which seemed to Mr. Ames to make the early law as he conceived it afford a desirable rule for all time, when they have been achieved and kept as part of the modern law, are placed on quite other grounds than those urged by Mr. Ames. Nevertheless possession is still of vital importance in English and American law, though it is not the equivalent of title.[2] The purpose of this article is to consider briefly what modification there may be in modern times of one of the consequences of the early theory of seisin, not much discussed in the papers above referred to.

I

If a disseisor, or a bailee, acquired by virtue of his possession of goods the property in them, even more clearly, it would seem, a seller of goods who should fail to deliver them would still remain the owner; and Pollock and Maitland regard it as fairly certain

[1] Maitland, "The Seisin of Chattels," 1 L. QUART. REV. 324; Ames, "The Disseisin of Chattels," 3 HARV. L. REV. 23, 313, 337; Bordwell, "Property in Chattels," 29 HARV. L. REV. 374, 501, 731; Bordwell, "Seisin and Disseisin," 34 HARV. L. REV. 592, 717.

[2] This importance is not a peculiarity of Anglo-American law. The familiar provision of Art. 2279 of the French code that *possession vaut titre*, though it conveys to one not familiar with the limitations of the rule and the disputes as to its meaning a somewhat exaggerated idea of the importance of possession even in the French law, is significant, and Art. 1141 explicitly provides that a second buyer from a seller who still retains possession prevails over an earlier buyer who failed to obtain delivery.

that in Bracton's time delivery of possession was essential to the transfer of ownership of a chattel, either by way of gift or of sale.[3] But the treatment of the matter by Glanville leaves it somewhat doubtful whether, even when he wrote, payment of the price might not be sufficient. He says:[4]

"A purchase and sale are concluded effectively as soon as the price has been agreed upon between the contracting parties, provided the delivery of the thing purchased and sold has followed, or that the price has been paid in whole or in part, or at least that earnest money has been given and received on either side. But in the two former cases neither of the contracting parties can withdraw from the contract, of his own will alone, except for some just and reasonable cause, for instance, if it were agreed upon between them that it shall be allowable for either of them to withdraw with impunity therefrom within a certain time, for it is a general truth that '*conventio legem vincit.*' " . . .

"Where, however, earnest money has been given, if the purchaser have wished to retire from the contract, it will be permitted him with the loss of his earnest. But if the vendor have wished to retire in such a case I ask whether he can do so without a penalty? It does not seem so, because in that case a vendor would seem to be in a better position than a purchaser. But if he cannot do this with impunity, what penalty shall he incur? The risk of the property sold and bought generally rests upon him who has possession of it, unless it have been otherwise agreed."

Bracton says, however, that "the dominion of things is not transferred without delivery."[5] Like Glanville, he says that the risk follows possession. A seller who disposes of goods after receiving earnest can withdraw from his bargain but is bound to repay double the earnest money. In regard to this matter of earnest, Pollock and Maitland say:[6]

"In Fleta the law merchant is said to be much more stringent, in fact prohibitory, the forfeit being five shillings for every farthing of the earnest, in other words 'pound for penny.' It is among the merchants

---

[3] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 180. So also 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 266, 282.

[4] GLANVILLE, DE LEGIBUS REGNI ANGLIAE (Twiss's Trans., Tenth Book, chap. 14, p. 303). The same passage may be found in Beale's edition of Beames's Translation, p. 216. Glanville wrote in about the year 1200.

[5] Vol. 1, chap. 27, p. 489 of Twiss's Translation.

[6] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 208, 209.

that the giving of earnest first loses its old character and becomes a form which binds both buyer and seller in a contract of sale. . . . "

"A few years later Edward I. took the step that remained to be taken, and by his *Carta Mercatoria*, in words which seem to have come from the south of Europe, proclaimed that among merchants the God's penny binds the contract of sale so that neither party may resile from it. At a later day this new rule passed from the law merchant into the common law." [7]

It is not clear at what time it became recognized that a buyer might acquire a property interest without delivery. In Henry VI's reign, however, we find it clearly stated that upon an agreement to sell a specific chattel the vendor may sue in debt and the purchaser in detinue.[8]

"The right to get the chattel gave a right to sue in detinue. . . . It is clear that this is a departure from the old law and an extension of the actions of debt and detinue. It is possible that if we look closely at these extensions we shall see the origin of the doctrine that a contract of sale of specific goods passes the property in the goods." [9]

About this time also, if not earlier, it became established that property in the goods might be transferred by deed without either delivery or payment of the price or of earnest. Speaking of the thirteenth century, Pollock and Maitland say:[10]

"At a later time [than the 13th century] our common law allowed that the ownership of a chattel could be transferred by the execution, or rather the delivery, of a sealed writing. . . . We can hardly suppose that it was already known in the thirteenth [century]."

---

[7] NOY, MAXIMS, c. 42: "If the bargain be that you shall give me ten pounds for my horse, and you do give me one penny in earnest, which I do accept, this is a perfect bargain; you shall have the horse by an action on the case, and I shall have the money by an action of debt."

[8] Y. B. 20 HENRY VI, Trin., pl. 4; Fortescue, arguing, says: "Sir, I will show that if I buy a horse from you, now the property in the horse is in me, and for that you shall have writ of debt for the money, and I shall have detinue for the horse on that bargain." In Y. B. 37 HENRY VI, Mich., pl. 18, Prisot, arguing, says: "As if a man buys a cow or a horse from me for 20 shillings, now I shall have good action of debt against him because of his sale, and yet perhaps the buyer has no *quid pro quo*, for perhaps I have no horse, and yet I shall have good action of debt; for it is no plea for me to allege that I have no horse at the time of the sale, because *caveat emptor*. But if I have the horse he can take him from my possession because of my sale."

[9] 3 HOLDSWORTH, HIST. OF ENG. LAW, 282.

[10] 2 HIST. OF ENG. LAW, 2 ed., 181.

The rule clearly was established by the reign of Edward IV. In his learned opinion of the necessity of delivery for an effective gift, Fry, L. J., says:[11]

"In the reign of Edward IV. a step seems to have been taken in the law relative to gifts which resulted in this modification: that whereas under the old law a gift of chattels by deed was not good without the delivery of the chattel given, it was now held that the gift by deed was good and operative until dissented from by the donee.

"Thus in Michaelmas Term, 7 Edw. 4, pl. 21, fol. 20, it was held by Choke and other justices that if a man executes a deed of his goods to me that this is good and effectual without livery made to me, until I disagree to the gift, and this ought to be in a Court of Record.

"In Hilary Term, 7 Edw. 4, pl. 14, fol. 29, it was alleged by counsel (Catesby and Pigot), that if a man give to me all his goods by a deed, although the deed was not delivered to the donee, nevertheless the gift is good, and if he chooses to take the goods he can justify this by the gift, although notice has not been given by him of the gift; and further, that if the donee commit felony before notice, &c., still the king will have the goods, and although notice may be material, nevertheless when he has notice, this would have relation to the time of the gift, &c. But the Court said that such a gift is not good without notice, for a man cannot give his goods to me against my will."

By the sixteenth century it seems to have been established that the property in goods would pass to the buyer without delivery if he either paid for them or gave earnest, or a fixed time of credit was expressly limited. The doctrine of implied concurrent conditions in bilateral contracts was not developed, but the unfairness of allowing a buyer to claim goods before he had paid for them was too obvious to be disregarded. In the modern law of sales the seller is protected by giving him a lien, but the early law gave protection by treating the transaction as what is now called a cash sale; that is, the transfer of ownership was conditional upon immediate payment of the price unless it was otherwise expressly agreed.

"If I am in the market, and you have a piece of cloth and I say that I will give you 20 shillings for it and you agree, and while I am counting my money some one gives more and throws his money to me, still, I, who am the first buyer shall have it for there is no default in me, and I

---

[11] Cochrane *v.* Moore, 25 Q. B. D. 57, 67, 68 (1890).

have done my duty and therefore it was a perfect contract. But if there was any default in me, as if I depart and the other is in no certainty of his duty, then it is not a perfect contract but a communication, and each of the parties is free, and the reason is because each has not the same advantage one against the other, for one will have a chose in possession and the other perhaps an action which will neither be right nor the same advantage." [12]

But the property now might also be transferred without delivery or payment of the price if a day of credit was expressly limited.

"This diversity was taken, when the day of payment is limited, and when not: in the first case, the contract is good immediately, and an action lies upon it without payment; but in the other not so: as if a man buy of a draper twenty yards of cloth, the bargain is void, if he do not pay the money at the price agreed upon immediately; but if the day of payment be appointed by agreement of the parties, in that case, one shall have his action of debt, the other an action of detinue." [13]

Blackburn assumes that the difference between the early and the modern English law with reference to transfer of ownership by mere agreement is merely a difference of presumed intention.[14] But the distinction is deeper than a rule of presumption. The early law did not deal with implied intention; parties must express their desires in words or they were of no legal consequence. This is illustrated in the late development of contracts implied in fact; [15] and the law of Sales presents the same phenomenon.

The law thus fixed underwent little recognized change until the beginning of the nineteenth century. Until then the statement made in 1641 by Noy remained nearly if not quite acceptable. Noy's statement is:

"In all . . . agreements there must be *quid pro quo* presently, except a day be given expressly for the payment, or else it is nothing but communication. If a man do agree for a price of wares he may not carry them away before he hath paid for them. . . . But the merchant shall

[12] 14 HENRY VIII, Hil., pl. 7, per Brook. [13] Dyer, 30 *a* (1537).

[14] CONTRACT OF SALE, 1 ed., 148; 3 ed., 181, 182. "In the earlier English law books, it seems to be assumed that all agreements are of this ready money character, unless there is something to indicate a contrary intention." The author then quotes from NOY'S MAXIMS; but there is no support in his quotation for the suggestion that a "contrary intention" would be given effect.

[15] See Ames, "The History of Assumpsit," 2 HARV. L. REV. 53; LECTURES ON LEGAL HISTORY, 149.

retain the wares until he be paid for them, and, if the other take them, the merchant may have an action of trespass or an action of debt for the money at his choice.

"If the bargain be that you shall give me ten pound for my horse and you do give me a penny in earnest which I accept, this is a perfect bargain. You shall have the horse by an action of the case, and I shall have the money by an action of debt.

"If I say the price of a cow is four pound, and you say you will give me four pound and do not pay me presently, you may not have her afterwards, except I will, for it is no contract. But if you go presently to telling of your money, if I sell her to another you shall have your action of the case against me. . . .

"If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; but if he does presently tender me my money, and I do refuse it, he may take the horse or have an action of detainment. And if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer." [16]

Sheppard's Touchstone, the first edition of which was published shortly afterwards, asserts the same diversities.[17] And they are repeated in 1676 in the seventeenth section of the Statute of Frauds. This section allows validity to no contract for the sale of goods for the price of ten pounds or more, "except the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

It is almost certain that this section of the statute was intended and understood to relate only to executed sales; and such was its construction for a century or more after its enactment.[18] Its effect would then be, in regard to transactions for the price of ten pounds or more, to deny validity to a cash sale where the buyer began presently to count his money and nothing had yet passed, and also, and more particularly, to invalidate a sale where an express day of credit was given unless one of the statutory requisites had been complied with. Not only the substantial identity of the require-

[16] NOY'S MAXIMS, chap. 42. [17] SHEPPARD'S TOUCHSTONE, 224, 225.

[18] Towers *v.* Osborne, 1 Strange, 506; Clayton *v.* Andrews, 4 Burr. 2101 (1767).

ments of the section, allowed as alternatives to a memorandum, with the early requirements of the common law for an executed sale, points to the correctness of the early construction, but it should be observed that executory contracts to sell are within a clause of another section of the statute,—the clause relating to contracts not to be performed within a year,—and there is no reason why an executory contract to sell which is to be performed in less time should be dealt with more strictly than executory contracts of other kinds. Moreover, the portion of the statute where section seventeen occurs relates to transactions like devises, trusts, and judgments which are in their nature executed rather than executory.

It was not until 1792 that it was decided that executory agreements were within the terms of the seventeenth section of the statute.[19] Lord Loughborough in so holding said: "It seems plain from the words made use of that it was meant to regulate executory as well as other contracts. The words are 'no contract for the sale of any goods' etc." In basing an argument on the use of the word "contract" Lord Loughborough forgot that this word is that habitually used for sale in the older books, and that it was rarely used in the sense of executory obligation.[20]

Blackstone in the latter half of the eighteenth century substantially copies Noy's statement of the law.[21] He does indeed say, "As soon as the bargain is struck the property in the goods is transferred to the vendee, and that of the price to the vendor"; but he also says after Noy, "If the vendor says the price of a beast is £4 and the vendee says he will give £4 the bargain is struck; and they neither of them are at liberty to be off provided immediate payment be tendered by the other side; but if neither the money be paid nor the goods delivered, nor tender made nor any subse-

[19] Rondeau *v.* Wyatt, 2 H. Blackst. 63 (1792).

[20] In the Mirrour of Justices, chap. xxvii (p. 73 of Selden Society Translation) it is said: "Contract is a discourse between persons to the effect that something that is not done shall be done. And of this there are divers kinds, some of which are perpetual, such as gift, sale, matrimony, and others are temporary, such as bailments and leases. And there are a mixed kind, such as exchange, which may be for a time and may be for ever. And one kind of contract is an obligation." The use of contract for sale is frequent in the Year Books, and when Noy says in 1641: "If I say the price of a cow is £4 and you say you will give me £4 and do not pay me presently, you may not have her afterward except I will, for it is no contract," he means there is no sale.

[21] 2 COMM. 448.

quent agreement entered into, it is no contract and the owner may dispose of the goods as he pleases." This should be understood to mean that there is no sale, for certainly when Blackstone wrote, executory bilateral agreements were enforceable.

Early in the nineteenth century, if not before, it became clear that if nothing remained to be done to put goods which were the subject of a bargain in a deliverable condition or to fix the price, the property presumably passed as soon as the bargain was made, though the goods were not delivered nor the price paid, nor earnest given.[22]

II

Though it is thus clear that for centuries delivery of possession has not been necessary to transfer the property in the goods, and that in modern times not only delivery but no other formality, except such as the Statute of Frauds expressly requires, is essential, the bare intention of the parties being sufficient and that intention being presumed if nothing remains to be done but to exchange in the future the goods for the price, yet possession has continued to be vital for perfect and complete ownership.

The familiar statute against fraudulent conveyances[23] was enacted in the reign of Elizabeth, and this statute was held in 1601 to be applicable to a transfer made in satisfaction of a debt due to the

---

[22] That does not seem to have been decided until 1827, in the case of Tarling *v.* Baxter, 6 B. & C. 360 (1827); and even in this case an express term of credit was given, though the seller was not to remove the goods until they were paid for. Certainly after the publication of BLACKBURN on the CONTRACT OF SALE in 1844, the principle stated in the text has not been doubted.

In Dixon *v.* Yates, 5 B. & A. 313, 340 (1833), Parke, J., said: "I take it to be clear that by the law of *England* the sale of a specific chattel passes the property in it to the vendee without delivery. The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned in Bailey *v.* Culverwell, [See Com. Dig. Biens, D. 3] 2 *Mann. & Ry.* 566, in a note by [the reporters; but I apprehend the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

[23] 13 ELIZ. c. 5.

grantee where the grantor retained possession and continued to use the goods as his own.[24] A century later in a case where the seller was left in possession by the buyer with authority to sell the goods,[25] it was argued that the sale was fraudulent and void as to creditors, and counsel said:

"It had been ruled forty times in his experience in Guild Hall that if a man sells goods and continues in possession as visible owner of them that such sale is fraudulent and void, as to creditors and that the law has always been so held; [but] My Lord Chancellor was of Opinion, that the trust of those goods appeared upon the very face of the bill of sale; that though they were sold to the plaintiffs, yet they trusted Brewer [the seller] to negotiate and sell them for their advantage, and Brewer's keeping possession of them, was not to give a false credit to him, as in other cases which have been cited, but for a particular purpose agreed upon at the time of sale."

The distinction thus suggested was upheld in the Kings Bench nearly a century later, where Buller, J., speaking for the court said: "We are all of opinion that if there is nothing but the absolute conveyance without the possession, that in point of law is fraudulent," but otherwise "if the want of immediate possession be consistent with the deed."[26] Some years later, however, it was held that in any case retention of possession is only evidence of fraud, and that if the transaction is made in good faith retention of possession will not make it voidable.[27]

The question has been made of much less importance in England than formerly by what are known as the Bills of Sale Acts.[28] These require that bills of sale whether given in an absolute sale or merely for the purpose of security (that is as chattel mortgages) shall be registered as a condition of their validity against third persons if possession of the goods is not transferred. But transactions entered into orally are not within the scope of the Act.

Another English statutory provision emphasizing the importance of possession so far as creditors are concerned is one which has been

---

[24] Twyne's Case, 3 Coke, 80 *b* (1601).

[25] Bucknal *v.* Roiston, Prec. in Ch. 285, 287 (1709).

[26] Edwards *v.* Harben, 2 T. R. 587, 597 (1788).

[27] Martindale *v.* Booth, 3 B. & Adol. 498 (1832).

[28] Those now in force are 41 and 42 VICT., c. 31; 45 and 46 VICT., c. 43; 53 and 54 VICT., c. 53; 54 and 55 VICT., c. 35.

contained in substance in all English Bankrupt Statutes since that of 1623,[29] and which provides that if bankrupts "by the consent and permission of the true owner and proprietary have in their possession order and disposition any goods and chattels whereof they shall be reputed owners" such goods shall pass under the commission in bankruptcy.

In the United States retention of possession is everywhere at least evidence of fraud against creditors, and in about a third of the states, by statute, there must be an immediate, notorious, and continuous change of possession in order to make a sale valid as against either creditors or purchasers.[30]

The question whether a seller who retains possession of goods after having transferred the property in them can make an effective sale of them to another purchaser who is ignorant of the prior bargain seems not to have been much discussed in the English books. There is, however, a *dictum* in 1821 by Abbott, C. J.,[31] that the second buyer with delivery would prevail. It is said in Blackburn on Sale,[32] that this is inconsistent with the later case of *Reeves* v. *Capper*.[33] In the latter case, however, the goods in question had been delivered to the first buyer though they were subsequently redelivered to the seller to hold as bailee, and the effect of the original delivery was relied on by the court in sustaining the title of the first buyer. Not long afterwards, however, there are decisions which unquestionably are inconsistent with the *dictum* of Chief Justice Abbott.[34]

Such decisions seem not to have commended themselves to the English Parliament, for in 1889 a statute finally settled the matter in favor of the buyer who first secured delivery though he might hold under a subsequent sale.[35] In the United States the same

---

[29] 21 JAC. I, c. 19, § 11.

[30] The American authorities are collected in WILLISTON, SALES, §§ 351 *et seq.*

[31] Knowles *v.* Horsfall, 5 B. & Ald. 134, 140 (1821).

[32] 3 ed., 496.

[33] 5 Bing. N. C. 136 (1838).

[34] In both Langton *v.* Higgins, 4 Hurl. & N. 402 (1859), and Young *v.* Matthews, L. R. 2 C. P. 127 (1866), a purchaser who had acquired ownership but who never had possession of goods was allowed to maintain an action against a subsequent purchaser to whom they had been delivered. There is also a *dictum* to the same effect in Meyerstein *v.* Barber, L. R. 2 C. P. 38, 51 (1866).

[35] 52 and 53 VICT., c. 45, § 8.

conclusion has generally been reached without the aid of statute.[36] In the leading case, a Massachusetts decision in 1821,[37] the court said: "The general rule is perfectly well established, that the delivery of possession is necessary in a conveyance of personal chattels, as against every one but the vendor. When the same goods are sold to two different persons, by conveyance equally valid, he who first lawfully acquires the possession, will hold them against the other."

The American Uniform Sales Act, now adopted by twenty-six states, provides expressly, as the English statute does, that a sale by a seller remaining in possession accompanied by delivery to the second buyer, provided the latter pays value in good faith, gives him a good title.[38]

The net result, therefore, of the modern law, in jurisdictions where retention of possession by a seller leaves the goods open to seizure by his creditors without regard to actual fraud, is not inaccurately expressed by the common statement that as between the parties (and only in controversies between them) the property may pass without delivery. In jurisdictions where the seller's creditors may not seize goods retained by him after a sale, unless there has been actual fraud, the statement needs some qualification. The results thus achieved, though reached by a different road, are not very unlike those which Mr. Ames sought to reach by some modification of the theory that a buyer without possession had a right of action for the property rather than the property itself.

III

Another type of case illustrating the ineffectiveness of mere intention to produce all the consequences of ownership, less often discussed than bargains for sale of specific existing goods, is afforded by bargains for the sale of future or unascertained goods. Let it

[36] McDermott *v.* Kimball Lumber Co., 102 Ark. 344, 144 S. W. 524 (1912); Patchin *v.* Rowell, 86 Conn. 372, 85 Atl. 511 (1912); Cummings *v.* Gilman, 90 Me. 524, 38 Atl. 538 (1897); Williams *v.* Lancaster, 119 Me. 461, 111 Atl. 754; Lanfear *v.* Sumner, 17 Mass. 110 (1821); Hallgarten *v.* Oldham, 135 Mass. 1 (1883); Flanigan *v.* Pomeroy, 85 Minn. 264, 88 N. W. 761 (1902); Hallett & Davis Piano Co. *v.* Starr Piano Co., 85 Ohio St. 196, 97 N. E. 377 (1911).

[37] Lanfear *v.* Sumner, 17 Mass. 110, 113 (1821).

[38] UNIFORM SALES ACT, § 25. The provision was enforced in Hier *v.* Wightman, 188 N. Y. Supp. 274 (App. Div., 1921).

be supposed that a seller contracts to sell such goods, that he later acquires them, and that they become clearly defined as the goods in regard to which the parties bargained. Of course if they are merely goods of the proper kind, no interest in them can pass unless by some special appropriation or delivery, for the seller might satisfy his contract by getting other goods of the same kind and furnishing those; but if he contracts to sell all the goods of a certain kind which he may afterwards acquire, or the first goods of the sort which he acquires, or anything which when acquired is the only thing that can fulfill the description in the contract, no such possibility is open. Likewise subsequent mutual assent to a particular thing as the thing which shall be applied in fulfillment of the contract precludes every right if not every power to dispose of that article otherwise than by transferring it to the buyer. In such cases why may not the ownership pass to the buyer as soon as the goods are identified? Why should not the rule be the same as it is in regard to bargains for the sale of existing goods,—that whether the ownership passes depends upon intention, and that in the absence of any expression indicating the contrary, an intention is implied to transfer ownership as soon as the goods are identified, and nothing further remains to be done to put them in a deliverable condition. There is singularly little discussion about the matter, but this statement pretty clearly does not represent the law, and whether even an express intention that ownership shall pass at that moment is effective, is not free from doubt.

Two distinct principles seem to have contributed to render doubtful the possibility of such transfer by mere force of the intention of the parties. One of these is that which has just been discussed with reference to chattels existing and specific at the time of the bargain — the assumed necessity of delivery. The other, a rule of logic as well as of law, is that it is impossible to make an effective present grant of property not now in existence, and specified. It may first be shown how the latter rule affects the problem.

The early authorities are stated in Tindal, C. J., in a summary of the plaintiff's argument in *Lunn* v. *Thorton:*[39]

"On the part of the plaintiff, the authorities were strong to shew that no personal property could pass by grant, other than that which belonged

[39] 1 C.B. 379, 386 (1845).

to the grantor at the time of the execution of the deed. *Perkins* [Tit. *Grants*, § 65] says, 'It is a common learning in the law, that a man cannot grant or charge that which he hath not.' So in *Hobart's Reports*, [page 132] it is laid down, that 'a man cannot grant all the wool that shall grow upon his sheep *that he shall buy hereafter;* for, there he hath it neither actually nor potentially,' — a distinction which seems to be adopted by *Perkins*, [Tit. *Grants*, § 90] 'that, if a man grants unto me all the wool of *his sheep* for seven years, the grant is good.' By which is evidently intended, the wool of sheep which the grantor at that time has. And, still further, the plaintiff relied on the authority of *Bacon's Maxims* [Reg. 14]: '*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio praecedens, quae sortiatur effectum, interveniente novo actu.*' Upon which it is to be observed, that Lord *Bacon* takes the first branch of the maxim, namely, that a disposition of after-acquired property is altogether inoperative, as a proposition of law that is to be considered as beyond dispute; and only labours to establish the second branch of the maxim, namely, that such disposition may be considered as a declaration precedent, which derives its effect from some new act of the party after the property is acquired; for, he says, 'The law doth not allow of grants, except there be a foundation of interest in the grantor; for, the law will not accept of grants of titles, or of things in action, which are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all, but merely future.' "

It is clear that these early authorities are correct in holding that there can be no present grant of unidentified or future goods. The early lawyers were illogical only in making an exception of goods in the "potential possession" of the seller, holding as they did that a present grant might be made of future crop of land owned by the seller, or the future wool or young of animals belonging to him at the time of the grant. But they did not consider whether words purporting to be a present grant of such goods might not be regarded as at least a contract that they should be the buyer's when they came into existence and into the seller's possession; and, if the transaction was so regarded, what the effect of the contract would be on the subsequent ownership of the goods. In this failure to consider words strictly appropriate to present grant as implying a contract to perform in the future is visible again the indisposition of the early law to make implications. And even after the law had developed so far that implications of fact were generally effectual, early modes of state-

ment established before that time persisted. So it is said in Powell on Contracts,[40] with no suggestion that what is invalid as a grant may be effective as a contract: "In our law, therefore, every contract executed, respecting a subject of which the party conveying is not owner, actually or potentially, at the time of entering into it, is void. Thus if a man grant all the wool that shall grow upon his sheep, that he shall buy *hereafter*, this is a void grant; for he has the wool neither actually nor potentially."

Indeed the earliest statement in the books recognizing that such a grant amounted in effect to a contract seems to have been in 1871.[41] There is abundant authority now for the proposition in the United States,[42] and it has been incorporated in the English Sale of Goods Acts,[43] and in the American Sales Act.[44]

It may thus be taken as settled that what purports to be a present grant of future or unspecified goods amounts to an agreement that the buyer shall have such goods in the future, and the inquiry becomes pertinent, What is the effect of such an agreement on the ownership of the goods when the seller acquires them and their identity becomes fixed? When the law regarding existing goods had so far developed that not only delivery was unnecessary to a transfer of the property in the goods but the property was presumed to pass immediately upon the making of the bargain, in the absence of circumstances indicating a contrary intention, it might be supposed that a similar rule would be applied to a contract to sell future or unidentified goods, so that the ownership would presumably pass as soon as the goods became identified and the seller acquired them; but this supposition is unsupported.

In 1808, in the case of *Mucklow* v. *Mangles*,[45] a buyer who had paid the whole value of a barge while it was in the course of con-

---

[40] Page *152 (1791); 5 Am. ed., p. 93.

[41] By Lord Westbury — Vickers *v.* Hertz, 9 Session Cas., 3d series (H. L.), 65, 71 (1871).

[42] Hogue-Kellogg Co. *v.* Baker, 32 Cal. App. 56, 190 Pac. 493 (1920); Bates *v.* Smith, 83 Mich. 347, 47 N. W. 249 (1890); Battle Creek Bank *v.* First Bank, 62 Neb. 825, 88 N. W. 145 (1901); Proctor & Gamble Co. *v.* Peters, 187 App. Div. 376, 176 N. Y. Supp. 169 (1919).

[43] Sec. 5. Judge Chalmers in his annotation to the Act which he drew cites in support of the provision, Lunn *v.* Thorton, 1 C. B. 379, 386 (1845). That case, however, gives no suggestion of such a doctrine but merely holds that a present grant of goods not then in existence can convey no title to them.

[44] Sec. 5 (3).

[45] 1 Taunt. 318 (1808).

struction brought trover against the assignees of the bankrupt sellers who were in possession of the barge, which had been nearly finished before an act of bankruptcy had been committed, and the buyer's name had been painted on the stern. It seems clear that this identical barge was the only one to which the contract could relate. The builder would not have been justified in selling it to another person and informing the buyer that another barge would be made for him. The barge, however, was not in deliverable condition and the case might be rested on this ground, but one member of the court, Lawrence, J., said: "No property vests till the thing is finished and delivered." The effect of later decisions is expressed in the Sale of Goods Act,[46] in the provision which has been copied in the American Uniform Sales Act [47] to the effect that the property presumptively passes in such a case when the goods have been "unconditionally appropriated to the contract" with the assent of both parties. It seems clear from the decisions that "appropriated" means something more than "identified." Judge Chalmers in his annotations to the English statute expresses regret that the word delivered was not used in the Act instead of appropriation, for he believes that in the cases where the property has been held to pass there has been at least a constructive delivery.[48] It is going pretty far to call an act constructive delivery where the seller retains the entire possession and control of the goods but has merely set them aside for the buyer with the latter's consent.[49] But it is probable that the idea of constructive delivery is at the bottom of the rule regarding such appropriation.[50]

---

[46] Sec. 18, Rule 5 (1). [47] Sec. 19, Rule 4 (1).

[48] CHALMERS, SALE OF GOODS ACT, 8 ed., p. 59.

[49] This is, however, sufficient appropriation. Wilkins *v.* Bromhead, 6 M. & G. 963 (1844); Weld *v.* Came, 98 Mass. 152 (1867); Tift *v.* Wight & Weslosky Co., 113 Ga. 681, 39 S. E. 503 (1901).

[50] In Mason *v.* Lickbarrow, 1 H. Bl. 357, 363 (1790), Loughborough, J., said: "The sale is not executed before delivery: and in the simplicity of former times, a delivery into the actual possession of the vendee or his servant, was always supposed. In the variety and extent of dealing, which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the removing them for the purpose of being delivered, may all entitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely devested, till the goods have come into the possession of the vendee."

It may be said that so far at least as this rule has been expressed in the English and American statutes it is merely one of presumed intention, and that if the parties clearly express the intention that the property in the goods shall pass without other appropriation, as soon as they become identified this intention will be effected.[51] This argument is not conclusive if reference is had merely to the words of the statute, and from the standpoint of authority a difficulty is presented by the decisions where the seller in terms makes a present grant. It seems hard to question the conclusion that the proper inference in such a case is not merely that the seller will make the buyer owner in the future by some further act, but that the seller agrees at the time of the grant that the buyer shall become owner by virtue of the very agreement itself. If an intention of the parties that the property shall pass immediately on the identification of the goods is ever effectual the rule should be applicable to transactions where the seller purports to make a present grant of future property. But courts have almost uniformly declined to give this effect to such a present grant, though this has been done without much discussion. Most of the cases have related to mortgages where an attempt was made to transfer by way of mortgage, generally together with existing goods, the property in future goods. In the leading case of *Holroyd* v. *Marshall*[52] the English court held that such a transaction gave the transferee an equitable property interest, but it was agreed by the court that for the transfer of a legal interest some *novus actus interveniens* was necessary. Judge Story had made a similar decision in the United States at an earlier day,[53] and there

[51] Section 18 of the Sales Act provides that property in specific goods passes when the parties so intend. This section clearly does not touch the problem where the goods are unspecified. Section 17 provides as to unascertained goods that no property passes until the goods become ascertained. Section 19 provides that unless a different intention appears, the property in unascertained or future goods passes when the goods are unconditionally appropriated to the contract with the assent of both parties. Under these provisions it is clear that property in unascertained or future goods cannot pass until they are specified, and, unless a different intention appears, will not pass until there is an act of appropriation; but the statute does not specifically say that an intention that the goods shall pass, without an act of appropriation, as soon as they become ascertained will be effectual. It may be added that the statute was intended to codify the common law, and should be considered with reference thereto.

[52] 10 H. L. Cas. 191 (1861).

[53] Mitchell *v.* Winslow, 2 Story, 630 (1843).

have been a great number of cases subsequently.[54] The point discussed in these cases is whether the mortgagee obtains an equitable right to the future goods, it being assumed that he gets no legal title. In many jurisdictions he does not acquire any property right, legal or equitable.

There have been few cases of the sort in the Law of Sales. There have, however, been a few. In *Low* v. *Pew*,[55] the owners of a fishing schooner received part payment of the price of a catch of halibut to be obtained on a voyage of the schooner about to be undertaken. The sellers signed a paper stating "we hereby sell, assign, and set over," all the halibut that might be caught on the voyage upon which the schooner was about to proceed. The sellers became bankrupt shortly before the return of the schooner and it was held that the assignees in bankruptcy were entitled to the catch; yet it is evident that as each fish was caught the expressed intention of the parties was that the buyer should have that fish. If the law permits such a bargain ever to be effectual to transfer ownership on the goods becoming identified, it would seem that this should have been allowed in that case. The recent case of *Procter & Gamble Co.* v. *Peters*,[56] presents a similar inquiry. In that case, a corporation engaged in the production of fish oil entered into a contract providing that it "hereby sells" and the purchaser (the plaintiff) "buys" from it "all the Menhaden Fish Oil to be produced" at its plant from the date of the contract to a certain date, except 6000 barrels which its agent had an option to take under a prior agreement. The purchaser was to receive the oil in tank cars to be supplied by it at the factory or at its option in barrels to be furnished by it. The oil was to be invoiced to the purchaser by the agent of the seller "as and when" it was produced at the factory, and thereupon said agent was to be entitled to draw at sight to its own order upon the purchaser for the oil at a certain rate per gallon.

The oil after it was extracted at the seller's plant was allowed to remain in settling tanks until it became clear and then was pumped into storage tanks from which it was pumped out for

---

[54] See 19 HARV. L. REV. 557, where the matter is discussed and the cases collected.

[55] 108 Mass. 347 (1871).

[56] 187 App. D. 376, 176 N. Y. Supp. 169 (1919).

shipment. Part of the oil thus accumulated was shipped through the seller's factor, who diverted it to a third person, and the plaintiff brought this action for conversion against the factor. A majority of the court held the plaintiff could recover, on the ground that the property passed to it when the oil was pumped into the storage tanks. Though the decision seems opposed to a great number of the decisions referred to above in which it has been held that a mortgage purporting to make a present grant of future property can at most give the mortgagee an equitable interest, it might be supported as a construction of the Sales Act which was in force in New York when the case arose, and which is relied on in the opinion of the majority of the court, since, as indicated above, this statute states the rule in regard to appropriation as one merely of presumed intention, if it were not for the circumstance that in the particular case the oil had not become fully identified. The seller's agent was entitled to an option to purchase part of the oil to the extent of 6000 barrels, and had not fully exercised its right. The point is not met by the suggestion of the court that though the plaintiff's title was subject to the exercise of the option, none of the oil in question had been taken in the exercise of the option. The agent was to take the oil which it desired from the seller, not from the plaintiff.

Samuel Williston.

HARVARD LAW SCHOOL.